United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

77-1053

To be argued by
JOHN J. KENNEY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1053

UNITED STATES OF AMERICA,
Appellee,

—v.—

ERNEST TUCKER and GAIL ANN TUCKER,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1053

UNITED STATES OF AMERICA,

Appellee,

—v.—

ERNEST TUCKER and GAIL ANN TUCKER,

Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Ernest Tucker and Gail Ann Tucker appeal from judgments of conviction entered in the United States District Court for the Southern District of New York on January 14, 1977, following a seven-day trial before the Honorable Robert J. Ward, United States District Judge, and a jury.

Indictment 76 Cr. 645 filed on July 13, 1976, charged the defendants, who are man and wife, in thirty-two counts with mail fraud in violation of Section 1341, Title 18, United States Code.

The trial commenced on November 29, 1976, and on December 7, 1976, the jury returned a verdict of guilty as to both defendants on counts 1, 2, 5 through 13, 15,

17, 18, 20, 21, 24 and 31.* On January 14, 1977, the Court sentenced Ernest Tucker to five years imprisonment on all counts to be served concurrently and Gail Ann Tucker to six months imprisonment on counts 1, 5, 7, 9, 11, 13, 17, 20 and 24, also to be served concurrently. The imposition of sentence as to Gail Ann Tucker on the remaining counts was suspended, and she was ordered to be placed on probation for a period of three years on each count, to be served concurrently with each other and to commence upon her release from prison.

Ernest Tucker is currently serving his sentence. Gail Ann Tucker has been released in her own recognizance pending the outcome of this appeal.

Statement of Facts

Synopsis

The Tuckers pursuaded large numbers of "agents" across the country to purchase advertising material from them at a cost of up to $575, which the agents would thus mail to a list of people also supplied by the Tuckers in return for half of the purchase price of the advertised items which were sold. The advertising materials, consisting of a mail list, envelopes, an advertisement, and a return envelope for orders, were described by the Tuckers as having been wildly successful in the past. This was untrue. Indeed, while millions of these advertisements were mailed, only a few hundred items were even available to be purchased. This and a number of other false statements resulted in substantial sales of the advertising materials themselves and corresponding profits for the

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* On December 2, 1976, Counts 3, 4, 14, 16, 19, 22, 23, 25 through 30 and 32 were dismissed by the Court within the consent of the government.

Tuckers. The "agents," however, found themselves out the price of the materials as well as the cost of postage for sending the advertising to the people on the mailing list. Almost uniformly, the agents received no orders.

A. The scheme is hatched

Early in 1974, Ernie and Gail Ann Tucker, operating under the company name Unique Ideas, Inc., from an office on Broadway in Manhattan, began running advertisements in national magazines and by direct mail for "the proven easy money method." The advertisement sought $10 in return for the "easy money secret" and contained a picture of an open attaché case full of money, a 10-day money back guarantee, a testimonial to Tucker's past successes and a "legal sworn affidavit" attesting to the fact that Tucker had earned $35,000 in one day. (Tr. 496-87, GX 1, P 21).* Approximately 2 1/2 million of these advertisements were mailed during 1974. (Tr. 770). Upon receipt of $10, Tucker would then mail a brochure which, in 34 pages, identified the product—genuine mink and sable robes ranging in price from $14.50 to $145, and genuine mink "show-offs," i.e., mink earrings, mink bow ties, etc., ranging in price from $3.50 to $12.50. (GX 8, 51). In addition, the brochure proposed that for an additional amount of up to $575, Tucker would send up to 10,000 advertisements for these items, envelopes, a mailing list consisting of pre-addressed labels and a return envelope for orders. Thus, becoming a business "agent," this person would at his cost mail out the 10,000 ads and keep 50% of any orders received, sending the orders and the remaining 50% on to Tucker. Unique Ideas would fill the order directly.

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* Citations to "Tr." refer to pages in the trial transcript; "GX" refers to Government Exhibits.

During 1974 and 1975, Tucker caused about 3 million of these brochures to be mailed.* (Tr. 259-74, 350-54, 332-45). From January 1974 until April 1975, Unique Ideas employed 35 people who packed and shipped 800-1000 orders of advertising materials every day, five days a week. (Tr. 496-98, 538-41, 595).** During this entire period only 625 minks and sable robes were actually shipped and the sale of "mink showoffs" never exceeded a few hundred. (Tr. 402-15, 418, 499-514).

B. The false and misleading advertising

The easy money method advertising contained a "Certified Notarized and Documented Legal Sworn Affidavit" attesting that Ernie Tucker earned $35,000 in a single day. The caption indicated the money was made from Tucker's easy money method. (GX 3, 30, 51, p. 2). In fact the accountant had refused to sign the statement because he believed it to be inaccurate, and, in any event, the money referred to came from the sale of phonograph records through a company entirely separate from Unique Ideas.*** (Tr. 461-67, 471-73).

The "Legal Sworn Affidavit" was signed by Gail Ann Tucker before a notary, but this was not reflected in the advertising. A bank reference, first to the Chelsea

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* A large number of these were unsolicited in which case the $10 was not received.

** These orders ranged from 500 to 10,000 pieces and from $79 to $575. See GX 3, 16, 51 at p. 28.

*** The accountant was shown deposit tickets of Tucker's company, Marlboro Distributing Co., for one day. It was unclear when and from what source the money came. In addition, it was a gross receipts figure not accounting for any expenses received. Upon discovering the affidavit in use, the accountant requested it be changed in the next printing to at least indicate that it reflected a gross amount.

National Bank in New York and later the Manufacturer's Hanover Trust Company, were included in the ads without either bank's knowledge or permission. When this was discovered, the accounts of Unique Ideas were closed by each bank. (GX 3, p. 2, 51, p. 2; Tr. 437-456, 556-61).

The advertisements for the easy money method selling fur flowers and "show-offs" contain the testimonial of "Ed. K."

> "Mr. E.K. of New York, who ordered my Easy-Money-Secrets says: 'I never made over $100 a week in my life until I made over TWO THOUSAND DOLLARS the very first month using your money mailing method. I'm glad I took a chance."

Mr. "E.K." is Edmund Kinckle, who runs a small Westchester County mail order business. He never used the Tucker money making method. Indeed, he never had a business relationship with Tucker. His sole contact with Tucker occurred when he requested Tucker's assistance in drafting an advertisement. Tucker gave some helpful suggestions, including using an ordering blank or "coupon" in the advertisement and displaying more items in the same space. Later, Tucker requested the testimonial, which he dictated to Kinckle. (Tr. 478-493).

C. The defrauded people

The vast majority of the "agents" who purchased and mailed the advertisements prepared by Unique Ideas received no orders for mink or sable flowers or mink show-offs. (Tr. 81, 185, 208, 232-33, 281). While approximately 250,000 sets of advertisements ranging from 500 to 10,000 were sold and sent out, still others who ordered and paid for the materials did not receive them. (Tr. 496-98, 538-41, 595; 217-20, 297-300, 320-21).

The Truckers, of course, knew that no orders would come in, and in fact, that what they were selling were only advertisements. Indeed, while millions of advertisements for fur items were shipped with every expectation they would be mailed to the various people on the mailing lists included, there were never more than a few hundred of the fur items produced or even ordered. (Tr. 400-411, 416-23).

By late Fall of 1974, tens of thousands of agents had been signed up and the mailings had long since been mailed. Yet only a few hundred orders were received. The Tuckers, however, having been paid for each package of advertising material before it went out, ordered five million and mailed about half that number of additional brochures stating sales of the fur items through agents had been a smash. (Tr. 802-06). All incoming mail to the Tuckers and Unique Ideas was stopped by the United States Postal Service in late January 1975 shortly after these mailings went out. (Tr. 899).

The Defense Case

Both Ernest and Gail Ann Tucker testified in their own behalf. Gail Ann Tucker testified that she was an employee and received directions from her husband. (Tr. 586 *et seq.*). She called witnesses to establish they had purchased mailing lists of people who were interested in women's accessories and had made at least one purchase through the mails in the past. (Tr. 702-63).

Ernest Tucker denied that any part of the advertising materials was false or misleading. (Tr. 765-74).

ARGUMENT

POINT I

The Court Properly Denied Tucker's Motion for Recusal.

On November 1, 1976, Ernest Tucker, appearing before Judge Ward for the purpose of setting a trial date, orally moved for recusal on the basis that the Court had presided at a civil proceeding involving the same defendant and subject matter. At the time the Judge noted surprise that Ernest Tucker intended to go to trial in the criminal case in light of the evidence the Court had heard and Tucker's criminal record. Tucker claims error in the District Judge's refusal to rescue himself.

This argument is wholly without merit, for several reasons. First, the very circumstances of the way in which it was raised in the District Court indicate its total lack of substance. Tucker was arraigned on July 22, 1976, and was represented by his trial attorney from that date. (Tr. 11/1/76, p. 8). Nevertheless, absolutely no motion was made, formal or otherwise, for recusal based upon Judge Ward's participation in the civil trial until a pre-trial conference on November 1, 1976. On that occasion, Judge Ward casually mentioned in passing his recollection of the civil case.* Counsel for Tucker thereupon

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* Tucker now makes much of Judge Ward's use of the word "victims" at this time. In the context of the type of fraud case spelled out in the indictment, "victims" are clearly a generic class of individuals; Judge Ward was certainly only using the term as a word of art in describing the potential Government witnesses. Indeed, the repeated reference to this one choice of words as their sole demonstration that Judge Ward had "reveal[ed] clearly his feelings as to the defendants' built [sic: "guilt"]", Brief at 19; see also Brief at 23, 24, 47, underscores the frivolousness of the argument.

admitted his knowledge of this fact, and for the first time, and in an unusually informal manner, asked Judge Ward to recuse himself. Noting, *inter alia*, the delay in even bringing the motion, Judge Ward affirmed his intent and ability to provide the defendants a fair trial and denied the application. He suggested, however, that Tucker submit an affidavit setting forth the facts underlying his motion. *No affidavit was ever submitted.* These facts not only barred Tucker from raising this claim,* but indicate his own lack of real interest in the matter.**

Second, even if the Tuckers had properly and timely raised the issue, Judge Ward was entirely justified in denying their application. This Court has recently, and exhaustively, examined the provisions and legislative history of 28 U.S.C. §§ 144 and 455 *** and the decisions in-

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* 28 U.S.C. § 144, see *infra* at * * *, provides that a motion to recuse will be heard only upon "a timely and sufficient affidavit" filed by a party. While 28 U.S.C. § 455 does not contain this requirement, two courts have ruled that an affidavit must be filed by one claiming the benefit of that section, *Samuel* v. *University of Pittsburgh*, 395 F. Supp. 1275, 1277 (W.D. Pa 1975), *vacated and remanded on other grounds*, 538 F.2d 991 (3d Cir. 1976); *Harley* v. *Oliver*, 400 F. Supp. 105, 110 (W.D. Ark. 1975). This Court has not decided that procedural issue. *United States* v. *Wolfson*, Dkt. No. 76-1393, slip op. 4021, 4027 (2d Cir., June 3, 1977). At any rate, since § 455 is "wholly silent about procedure," 13 Wright, Miller & Cooper, *Federal Practice and Procedures* at § 3550 (1975), the District Court is certainly empowered to *affirmatively require* an affidavit. Judge Ward did just that in this case, and Tucker's refusal to file one precludes his appeal on the issue.

** In the context of a collateral attack, this Court has noted that an issue raised "only belatedly" will be looked at with circumspection. *Seiller* v. *United States*, 544 F. 554, 568 (2d Cir. 1975).

*** Section 144 reads:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the

[Footnote continued on following page]

terpreting them in *United States* v. *Wolfson*, Dkt. No. 76-1393, slip op. 4021 (2d Cir., June 3, 1977). As the Court noted, both Section 144 and Section 455 speak in terms of "personal" bias and, further, that "for an alleged bias to be 'personal,' it 'must stem from an extrajudicial source. . . .'" Slip op. at 4027. See also, in addition to the cases there cited, *United States* v. *Bernstein*, 533 F.2d 775, 785 (2d Cir. 1976), *cert. denied*, 975 Ct. 523 (1977) ("what a judge learns in his judicial capacity . . . is a proper basis for judicial observations"), and cases there cited. In addition, this Court noted that a source is not "extrajudicial" merely because it came from a proceeding other than the very one then before the judge:

> "We understand that regardless of a court's fairness, a defendant who has undergone two

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judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

The relevant provisions of 28 U.S.C. §455 read:

(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . . .

> lengthy trials before the same judge, both of which ended in guilty convictions, may come to consider that judge as biased against him. These suspicions are understandable, but, without more, they do not provide a reasonable basis for questioning a judge's impartiality."

Slip op. at 4030. Since, as Judge Ward explicitly noted, the prior proceeding involving Tucker was a civil one, it necessarily follows *a fortiori* from *Wolfson* that Judge Ward was not obliged to excuse himself because of his participation in it. In short, his claim is meritless.

POINT II

The Claim That The Trial Judge Demonstrated Partiality Is Wholly Unsupported By The Record.

A. The refusal to grant the continuance was neither error nor a demonstration of bias or prejudice by the Court

On November 1, 1976, the Court called a pre-trial conference, directed Mrs. Tucker to obtain separate counsel for herself because of a possible conflict in presenting her trial defense, and set the trial date for November 29. Anticipating that counsel would claim on the eve of trial that he was not prepared, the Court directed the defendants, who were not present, to appear on November 9 if there was any problem in retaining counsel for Mrs. Tucker. (Tr. 11/1/76, p. 10, 13-14). On November 9, Mr. Chance, at that time counsel for both defendants, appeared alone but with affidavits from both Ernest Tucker and Gail Ann Tucker waiving any prejudice resulting from a conflict between them. The Court re-

peatedly offered to appoint counsel for Mrs. Tucker if her financial condition warranted it. (Tr. 17/9/76, pp. 1-7).

The next day, November 10, new counsel did not appear and the Court again ordered separate counsel for Mrs. Tucker and directed a notice of appearance be filed by 5:00 P.M. on November 12. The Court made clear to Mr. Chance that, whoever counsel was, he should be ready to proceed on November 29 or he should not take the case. (Tr. 11/10/77, pp. 6-8).* On November 15, Mr. Richardson appeared and filed a notice of appearance for Mrs. Tucker. The Court again made clear that the trial was scheduled for November 29 but certainly no later than December 1. Mr. Richardson immediately requested more time. The Court said there would be none but that it would hear an application for good cause after counsel began preparation. (Tr. 11/15/76, pp. 3-4, 7-11).

On November 23, Mr. Richardson requested an adjournment because he did not have time to prepare. This was denied, since the Court found no good reason for it. But the Court offered to hear a motion for a continuance during the trial if there was any showing it was necessary for Mrs. Tucker's defense. (Tr. 11/23/76, pp. 2-14).

Mrs. Tucker proceeded to trial on November 29. She presented a defense that she acted as an employee of Unique Ideas and did not have sufficient knowledge or act with the wilfulness necessary to be convicted of a crime. She called witnesses on her own behalf to establish the legitimacy of her conduct in the mail order business. No application was made for a continuance.

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* The government offered and in fact did make its files and trial exhibits available to counsel for Mrs. Tucker. (Tr. 11/10/76 at p. 9).

Indeed, no showing has been made here or in the trial Court as to how, if at all, Mrs. Tucker was prejudiced by the claimed lack of time to prepare.

Given the delay by Mrs. Tucker in retaining counsel after being informed by the Court on November 1, 1976 of the necessity to do so, the adequate time actually allowed (two weeks) after counsel filed his notice of appearance, and the absence of even a colorable claim of prejudice, the denial of a continuance cannot be viewed here as an abuse of discretion. See, *United States* v. *Carroll*, 510 F.2d 507, 510-11 (2d Cir. 1975), *cert denied*, 426 U.S. 923 (1976). Indeed, this conclusion surely follows *a fortiori* from this Court's recent decision in *United States* v. *Taylor*, Dkt. No. 76-1210, slip op. 2805 (2d Cir., April 13, 1977), not cited in Tucker's brief. There, one defense counsel in a complicated, lengthy case first met with his client on the Saturday preceding the Monday on which trial was scheduled to commence. His request for a week's continuance was denied, and trial was postponed only two days. Noting that the "granting or denial of a continuance lies within the sound discretion of the trial court," slip op. 2836, this Court held that that discretion was not abused. See also *United States* v. *Rosenthal*, 470 F.2d 837, 844 (2d Cir. 1972), *cert. denied*, 412 U.S. 909 (1973). In particular, it noted that the defendant had had time to seek counsel earlier, that the Government made its files available to counsel for preparation, and that the total amount of time prior to the commencement of testimony allowed counsel nine days of preparation. Slip op. 2836. The facts in this case, of course, are either identical to or, in the case of the total amount of preparation time, more favorable to the defense. Especially in view of the relative simplicity of the case, Mrs. Tucker was surely not prejudiced.

Ernest Tucker's claim that the Court's failure to grant his request for a continuance so that he might

retain counsel of his choice is totally frivolous. Tucker did ask for a two to three-week continuance on November 23, but his stated purpose was for more time for him and his then-present counsel to prepare for trial—not to obtain new counsel. (Tr. 11/23/76). At that time, Ernest Tucker had had the same counsel for four months. The Court properly denied this request. See *United States* v. *Carroll*, *supra*, 510 F.2d at 510; *United States* v. *Llanes*, 374 F.2d 712, 717 (2d Cir.), *cert. denied*, 388 U.S. 917 (1967).*

B. The Judge conducted the trial in an entirely proper manner

The appellants now claim that the trial Judge's involvement in questioning witnesses was error requiring reversal. This argument is without merit.

A trial district judge has a responsibility to see that a criminal trial is conducted fairly by making certain that the testimony is clear and by assisting the jury in understanding the evidence and issues at hand. He is more than an umpire or moderator. *United States* v. *Curcio*, 279 F.2d 681, 682 (2d Cir.), *cert. denied*, 369 U.S. 824 (1960); *United States* v. *Tyminski*, 418 F.2d 1060, 1062 (2d Cir. 1969), *cert. denied*, 397 U.S. 1075

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* The fact that Appellant Ernest Tucker complained to the Court in a robing room conference during his cross-examination that he wished that counsel put more time in on his case and that he was unhappy with his counsel adds nothing. No claim of incompetency of counsel has been made, nor could it be. See *United States* v. *Taylor*, *supra*, slip. op. at 2829, and cases there cited. This reaction is much more sensibly ascribed to the impact of realizing the overwhelming weight of the government's case, which was brought home to Tucker by government counsel on cross-examination. (Tr. 848-876). This Court's recent reiteration that "a convicted defendant is a dissatisfied client," *United States* v. *Joyce*, 542 F. 2d 158, 160 (2d Cir. 1976), aptly describes Ernest Tucker's reaction to the course of the trial.

(1970); *United States* v. *McCarthy*, 473 F.2d 300, 308 (2d Cir. 1972); *United States* v. *Cuevas*, 510 F.2d 848, 850 (2d Cir. 1975). "The precepts of fair trial and judicial objectivity do not require a judge to be inert." *United States* v. *Liddy*, 509 F.2d 428, 438 (D.C. Cir. 1974). Of course, in exercising his function, the trial judge must be careful to maintain an air of impartiality. *United States* v. *Natale*, 526 F.2d 1160, 1169 (2d Cir.), *cert. denied*, 425 U.S. 950 (1975). But the variety of circumstances that arise or occur during a particular trial often forces the Judge into a more active role than usual. *United States* v. *D'Anna*, 450 F.2d 1201, 1206 (2d Cir. 1971); *United States* v. *Tyminski*, *supra*. Such was the situation here.

Directions by the Court to the defendant Ernest Tucker while he was testifying was not an abuse of discretion but, on this record, was absolutely necessary. On direct examination, Mr. Tucker briefly explained the business of Unique Ideas and denied that the advertising contained any false or misleading statements. (Tr. 765-73). The lengthy cross-examination which followed is replete with evasions, refusals to respond and gratuitous statements by the defendant. The Court was repeatedly required to strike from the record statements made by the defendant and to direct him to answer the question asked. (Tr. 785, 800, 801, 803-04, 806, 808, 842, 844-45, 903, 909-10, 911, 913, 914, 920, 922, 924, 929, 932, 933, 940, 942, 952, 953, 958, 976, 986, 1003-04). In order to remedy this, the Court allowed Tucker to make an extraordinarily long, rambling narrative statement in the middle of the cross-examination. (Tr. 876-93). Finally, the Court found it necessary to threaten contempt in order to stop Tucker from making unresponsive remarks. (Tr. 929).

It is not surprising that the Court found it necessary to ask a number of questions intended to clarify the record. An example should suffice:

After distributing the advertising brochure for Unique Ideas for flowers to the jury, Government counsel sought from Tucker the basis of the statement "Thanks to my proven money-making method, the orders keep pouring in by the thousands." (GX 2, 16, 51 at p. 20). Tucker, realizing the weight of evidence that only a few hundred orders were ever received, found this statement did not refer to fur flowers and insisted that it must be read in conjunction with earlier pages, in the same booklet. Tucker then proceeded to give a narrative. The Court sought testimony as to what other pages Tucker had in mind. (Tr. 785-88).

A full reading of the record reveals that on balance the trial judge acted correctly to control the progress of the trial and to clarify the testimony in the record. See *United States* v. *Weiss*, 491 F.2d 460, 467-68 (2d Cir. 1974), *cert. denied*, 419 U.S. 833 (1974). Indeed, this case is wholly unlike those rare cases where this Court has been compelled to reverse a conviction because of the interjection of the trial judge into the trial. In *United States* v. *Fernandez*, 480 F.2d 726 (2d Cir. 1973), the trial judge asked more questions than either counsel, and openly showed his disbelief of a key defense witness. Id. at 737.* Rather, this case is governed by numerous

* In an effort to accommodate this case within a statistical footnote in the *Fernandez* opinion, 480 F.2d at 737 n. 19, Tucker has appended to his brief a compilation of the number of instances where Judge Ward interrupted the testimony with questions. This Court in *Fernandez* cautioned, however, that the record must be "read in its entirety to appreciate the full flavor" of the proceedings, *id.* at 737; in addition, of course, the statistical evidence of the Judge's intervention, and in particular his activity relative to that of counsel, was far stronger in *Fernandez*.

decisions of this Court affirming conviction in cases where the trial judge's conduct was far more troublesome than here. See, *e.g.*, *United States* v. *Boatner*, 478 F.2d 737, 738-42 (2d Cir.), *cert. denied*, 414 U.S. 848 (1973); *United States* v. *Sclafani*, 487 F.2d 245, 256 (2d Cir.), *cert. denied*, 414 U.S. 1023 (1973); *United States* v. *Weiss*, *supra*, 491 F.2d at 467-70; *United States* v. *Head*, 546 F.2d 6, 8 (2d Cir. 1976), *cert. denied sub nom. Wheaton* v. *United States*, 97 S. Ct. 1551 (1977).*

POINT III

The Court Properly Charged The Jury On Aiding and Abetting, and On Willfulness and Intent.

Finally, both appellants claim reversible error in the Court's charge on intent. (Tr. 1146).** This argument is utterly without merit.

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* Finally, Judge Ward instructed the jurors at some length (Tr. 1119-21) that they were the sole triers of fact, and that they were not to be swayed by anything said by him or by counsel, or by his rulings on objections. In the context of this case, such a charge surely precluded any prejudice to the defendants. *United States* v. *Boatner*, *supra*, 478 F. 2d at 741; *United States* v. *Pellegrino*, 470 F.2d 1205, 1207-08 (2d Cir. 1972), *cert. denied*, 411 U.S. 918 (1973).

** "I turn now to aiding and abetting, a subject which I said I would return to later in my charge. It is not necessary for the government to show that a defendant physically committed the crime himself or herself. You will recall that Section 2 of Title 18, United States Code, which I read to you, provides that a person who aids and abets another to commit an offense is just as guilty of that offense as if he committed it himself.

Accordingly, you may find either defendant guilty of the offenses charged if you find that beyond a reasonable doubt that one defendant committed the offense and that the other de-

[Footnote continued on following page]

The Court carefully charged the jury as to the knowledge and intent required for a criminal conviction.* Although this instruction was given at an earlier point in the Court's charge, read as a whole, as it must be, *United States* v. *Guillette*, 547 F.2d 743, 750 (2d Cir. 1976); *United States* v. *Hanlon*, 548 F.2d 1096, 1101 (2d Cir. 1977); *United States* v. *Magnano*, 543 F.2d 431, 435 (2d Cir. 1976), the charge was more than adequate on

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fendant aided and abetted that defendant.

To determine whether a defendant aided and abetted the commission of an offense, you ask yourself these questions: Did he or she associate himself or herself with the venture? Did he or she participate in it as something he or she wished to bring about? Did he or she seek by his or her action to make it succeed?

If the defendant you are considering did this, then that defendant is an aider and abettor." (Tr. 1135).

* ". . . The second element under each count that the government must prove beyond a reasonable doubt in order to convict either defendant is that he or she knowingly and willfully participated in the scheme or artifice to defraud and with intent to defraud.

An act is done knowingly if it is done voluntarily and purposely and not because of mistake, accident, mere negligence, or other innocent reason.

An act is done willfully if it is done knowingly and deliberately.

Under these statutes, a false representation or omission to state a material fact does not amount to a fraud unless it is made with fraudulent intent.

However misleading or deceptive a plan may be, the use of the mails to execute it does not constitute a crime if the plan was devised in good faith. An honest belief in the truth of the representations made by a person is a good defense, however inaccurate the statements may turn out to be.

The mere fact that a statement may be inaccurate or even a gross misrepresentation of the facts does not amount to fraud in the law unless the statement was made by the defendant knowingly and willfully and with an intention to deceive.

The question of the defendant's knowledge, intent and willfulness is a question of fact which you must decide in this case . . . ." (Tr 1131-32).

the requisite state of mind required for a criminal conviction. *United States* v. *Nemes*, Dkt. No. 76-1584, slip op. 3509, 3511 (2d Cir., May 16, 1977);* *United States* v. *Erb*, 543 F.2d 438, 447 (2d Cir. 1976), *cert. denied*, 97 S. Ct. 493 (1977);** *United States* v. *Gentile*, 530 F.2d 461 (2d Cir.), *cert. denied*, 426 U.S. 936 (1976).***

Two cases upon which Mrs. Tucker particularly relies demonstrate the poverty of her claim. First, she claims that the Third Circuit's decision in *United States* v. *Newman*, 490 F.2d 139 (3d Cir. 1973), involved a charge "substantially the same" as that here. Brief at 45. In that case, the Court's charge appeared to instruct the jury that under 18 U.S.C. § 2(b), a defendant must "wilfully" cause another to perform an act, but under subsection (a) the jury need only find that he aided and abetted the principal. *Id.* at 149-50. The Third Circuit reasoned that the jury may have concluded "that the defendant participated in the activities charged without knowing of their criminal objective." *Id.* at 142. It

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* In *Nemes*, the defendant raised a claim virtually identical to that raised by the Tuckers, but with respect to a conspiracy count. This Court noted that since the jurors had properly been instructed as to knowledge and intent on the substantive charges, looked at as a whole the charge properly enlightened them.

** In *Erb*, the trial court charged that a defendant "intends the reasonable and probable consequences of his actions." Noting that this Court had consistently found this instruction to be improper in a crime involving specific intent, the Court nonetheless upheld the conviction, noting that the jurors had been charged that they must find that the defendant associated himself with the crime "as something he wish[ed] to bring about" —precisely the language used here.

*** In *Gentile*, the trial court failed to instruct the jurors on the element of knowledge with respect to the conspiracy count. Looking at the charge as a whole, the Court found that the general portions of the charge "adequately advised the jury" of the required element. 530 F.2d at 469-70.

emphasized that the "government must prove beyond a reasonable doubt that the defendant participated in a substantive crime *with the desire that the crime be accomplished.*" *Id.* at 143 (emphasis in original). That, of course, is precisely what Judge Ward's charge did, in concluding "Did he or she participate in it as some thing he or she wished to bring about? Did he or she seek by his or her action to make it succeed?" (Tr. 1135). In *United States* v. *Wisniewski*, 478 F.2d 274 (2d Cir. 1973) the Court's charge was challenged precisely because it put *too much* emphasis on intent, rather than—as here—on the nature of the defendant's *participation* in the crime.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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★ U. S. Government Printing Office 1977— 714—017—631

AFFIDAVIT OF MAILING

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Lawrence Iaran being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 13 day of July, 1977, he served ~~a~~ two copy~~ies~~ of the within brief by placing the same in a properly postpaid franked envelope addressed:

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33133

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Lawrence Iaran

Sworn to before me this
13th day of July 1977

Jeanette Ann Grayeb

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Notary Public, State of New York
No. 24-1341575
Qualified in Kings County
Commission Expires March 30, 1979